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FOO POH SANG & ORS

v.

LIM TEIK CHEONG

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COURT OF APPEAL, PUTRAJAYA

GOPAL SRI RAM JCA

SITI NORMA YAAKOB JCA

MOKHTAR SIDIN JCA

[CIVIL APPEAL NO: A-02-403-1997]

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29 JUNE 2006

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CIVIL PROCEDURE: *Want of prosecution - Striking out action for want of prosecution - Delay in prosecuting action - Whether caused by defendants - Principles applicable - Whether court below failed to take into account relevant considerations when exercising discretionary power to strike out - Whether appellate intervention clearly warranted*

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This was an appeal by the plaintiffs against the order of the High Court striking out an action for delay in prosecuting it. In February 1983, the defendant solicitor (now deceased) prepared a sale and purchase agreement between the plaintiffs and a third party. The plaintiffs brought an action in November 1988 against the solicitor based on the tort of professional negligence and also for breach of fiduciary duties. Pleadings were exchanged; then, in February 1994, the deceased passed away and it was not until 2 1/2 years later that the plaintiffs effected substitution of the deceased solicitor's personal representative and made the appropriate amendments to the cause papers. Subsequently, the defendant's estate took out a summons to strike out the action for want of prosecution, which the registrar allowed. The plaintiffs' appeal to the judge failed resulting in the present appeal. The plaintiffs, in criticising the learned judge's finding that they were guilty of an inordinate delay in prosecuting the claim, submitted that he did not take into account facts which established that the delay in the trial of this case was in fact caused by the defendant.

Held (allowing the appeal)**Per Gopal Sri Ram JCA:**

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(1) On the facts, it was a fair inference from the evidence that the delay in the prosecution of the action had been occasioned not by the plaintiffs but by the defendant's request

for an adjournment. Yet this vital fact found no mention in the lengthy judgment of the judge. As for the 2 1/2 year delay in the substitution of the defendant's estate, a reading of the judgment appealed against did not show that it operated on the judge's mind. The striking out of a case for want of prosecution (whether at first instance or in appeals) should be invoked only in the clearest of cases, with the principles governing the exercise of this power well settled and set out in the judgment of Abdoolcader J in *Vasudevan v. T Damodaran*. Needless to say, the high degree of culpability called for to warrant a striking out was absent in this case. There was merit in the plaintiffs' complaint that although the judge referred to all the relevant principles, he failed to have regard to the peculiar facts of the present case when applying them. This was a case in which the court below failed to take into account relevant considerations when exercising its discretionary power to strike out, and accordingly, appellate intervention was clearly warranted. (paras 5, 6, 7 & 8)

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Bahasa Malaysia translation of headnotes

Ini adalah rayuan plaintif terhadap perintah Mahkamah Tinggi kerana membatalkan tindakan atas alasan berlaku kelewatan dalam pendakwaannya. Pada bulan Februari 1983, peguamcara defendan (si mati) menyediakan satu perjanjian jual beli di antara plaintif dan pihak ketiga. Pada bulan November 1988, plaintif memulakan tindakan terhadap peguamcara berasaskan tort kecuai profesionalisma dan pelanggaran tanggungjawab fidusiari. Pertukaran pliding-pliding telah dibuat; kemudian, pada Februari 1994, si mati meninggal dunia. Walaupun begitu, plaintif tidak membuat perubahan pada surat-surat cara guaman atau menamakan wakil peribadi si mati sebagai pihak kepada guaman sehinggalah 2 1/2 tahun kemudian. Berikutnya, pusaka defendan mengeluarkan saman untuk membatalkan tindakan kerana ketiadaan pendakwaan, dan permohonan dibenarkan oleh pendaftar. Rayuan plaintif kepada hakim gagal sekaligus mengakibatkan rayuan semasa. Plaintif mengkritik dapatan yang arif hakim yang mengatakan mereka berlaku lengah dalam mendakwa tuntutan, sambil berhujah bahawa yang arif hakim tidak mengambilkira fakta yang menunjukkan bahawa kelengahan dalam perbicaraan kes ini adalah disebabkan oleh defendan.

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**A Diputuskan (membenarkan rayuan)
Oleh Gopal Sri Ram HMR:**

- (1) Atas fakta, andaian wajar yang boleh dibuat dari keterangan adalah bahawa kelengahan mendakwa tindakan tidaklah berpunca dari plaintif tetapi disebabkan oleh permohonan defendan untuk penangguhan. Bagaimanapun, fakta penting ini tidak disentuh langsung oleh hakim dalam penghakimannya yang panjang lebar tersebut. Berhubung kelewatan 2 1/2 tahun dalam menamakan pusaka defendan, melihat kepada penghakiman yang dirayui, ia tidak diambil perkiraan oleh hakim. Pembatalan kes atas alasan ketiadaan pendakwaan (sama ada di mahkamah awal atau sewaktu rayuan) hanya boleh dibuat dalam kes-kes yang jelas sahaja, di mana prinsip mengenai sudah pun terpacat dan terserlah dari penghakiman Abdoolcader H dalam *Vasudevan v. T Damodaran*. Tidak diragukan bahawa tahap kebersalahan tinggi yang perlu ada sebelum tindakan membatalkan boleh dibuat tidak wujud dalam kes ini. Terdapat merit dalam rungutan plaintif bahawa, walaupun hakim merujuk kepada semua prinsip-prinsip relevan, beliau gagal mempertimbang fakta khusus kes ini apabila memakai prinsip-prinsip tersebut. Ini merupakan kes di mana mahkamah di bawah telah gagal mengambilkira pertimbangan-pertimbangan relevan apabila melaksanakan kuasa budi bicaranya untuk membatalkan kes, dan oleh itu campur tangan oleh mahkamah rayuan adalah wajar.
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Case(s) referred to:

Vasudevan v. T Damodaran [1981] CLJ 84; [1981] CLJ (Rep) 101 FC
(*fol*)

- G** For the appellants/plaintiffs - Gurbachan Singh; M/s Bachan & Kartar
For the respondent/defendant - VS Viswanathan (AS Vengadeswaran with him); M/s Lim Seong Chun & Co

[Appeal from High Court, Ipoh; Civil Suit No: 22-202-88]

- H** Reported by Suresh Nathan

JUDGMENT

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Gopal Sri Ram JCA:

[1] This is an appeal against the order of the High Court at Ipoh striking out an action for delay in prosecuting it. The cause of action is based on the tort of professional negligence and also for breach of fiduciary duties. The facts are not in dispute and may be shortly stated.

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[2] In February 1983, the defendant solicitor (now deceased) prepared a sale and purchase agreement between the plaintiffs and a third party. The plaintiffs' case is that the solicitor was negligent and in breach of the fiduciary duties he owed the plaintiffs. They brought an action against the solicitor in November 1988. Pleadings were exchanged. Then, in February 1994 the deceased passed away. It was not until 2½ years later in June 1996 that the plaintiffs effected substitution of the deceased solicitor's personal representative and made the appropriate amendments to the cause papers. But, as will appear shortly, nothing turns on this delay. On 13 September 1996 the defendant's estate took out a summons to strike out the action for want of prosecution. This was allowed by the registrar and an appeal to the judge failed. The plaintiffs then appealed to us.

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[3] In his written judgment the learned judge found the plaintiffs guilty of inordinate delay in prosecuting the claim. The plaintiffs criticise this finding. They complain that the judge did not take into account facts which establish that the delay in the trial of this case was in fact caused by the defendants. The evidence on the point is documentary and beyond dispute. There are four documents in all. The first is a letter dated 29 April 1993 from the plaintiffs' solicitors to the senior assistant registrar of the Ipoh High Court. That letter requests the court for an early date for the fixing of the case. You must remember that when this letter was written the provisions for case management had not been introduced. What you had to do was to file a Notice of Trial and an Entry of Trial forms. The latter requested the court to enter the action for trial and the former had a space for a date on which the cases on a published Fixing List would be mentioned either before the registrar or sometimes even before a judge. So, if you look at the letter against this background, the plaintiffs had done all in their power to expedite the hearing of their case.

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- A [4] The next document is dated 24 July 1993. It is a notice from the court to the parties informing them that the suit had been fixed for hearing on 10 January 1994. It appears from the record that on 17 December 1993 the defendant's solicitors wrote to the court to vacate 10 January 1994. This is reflected in the
- B letter dated 6 January 1994 from the court to the parties informing them that the defendant's application had been granted. Then, on 21 January 1994 the plaintiffs' solicitors wrote to the court requesting for the suit to be fixed for hearing and giving their free dates. The rest was silence.
- C [5] It is a fair inference from the evidence referred to a moment ago that the delay in the prosecution of the action had been occasioned not by the plaintiffs but by the defendant's request for an adjournment. Yet this vital fact finds no mention in the lengthy
- D judgment of the judge. As for the 2½ year delay in the substitution of the defendant's estate, a reading of the judgment appealed against does not show that it operated on the judge's mind.
- E [6] We are entirely conscious that delay in the due prosecution of an action is a matter to be treated with severity in appropriate cases. Of course everything depends on the facts and circumstances of each case. And we must emphasise that whilst it is a stark reality that our Courts are burdened with a heavy
- F caseload awaiting disposal, the Draconian power to strike out a case for want of prosecution (whether at first instance or in appeals) should be invoked only in the clearest of cases. It should not in any event be used as an easy option to clear the backlog in our courts.
- G [7] The principles governing the exercise of this power are now well settled and are set out in the judgment of Abdoolcader J in *Vasudevan v. T Damodaran* [1981] CLJ 84; [1981] CLJ (Rep) 101:
- H The House of Lords in *Birkett v. James* [1978] AC 297, 317, 326 approving the decision of the English Court of Appeal in a trilogy of appeals reported sub nomine *Allen v. Sir Alfred McAlpine & Sons Ltd* [1968] 2 QB 229, 245, 268, held that the power of the court to dismiss an action for want of prosecution should be exercised only where the plaintiff's default had been intentional and contumelious or where there had been inordinate and inexcusable
- I delay on his or his lawyers' part giving rise to a substantial risk that a fair trial would not be possible or to serious prejudice to

the defendant but, other than in a case of contumelious conduct on the plaintiff's part, should not normally be exercised where the delay had not extended beyond the end of the limitation period for the cause of action, and the House further observed *per curiam* that where a defendant is seriously prejudiced by a writ being issued long after the cause of action has accrued, *albeit* within the limitation period, the plaintiff must thereafter pursue his action with diligence and the action can only be dismissed (after expiry of the limitation period) for want of prosecution if the delay subsequent to the issue of the writ exceeds the time limits prescribed by the rules of court and is inordinate and inexcusable having regard to the delay before the issue of the writ, and the delay after the issue of the writ has caused some additional prejudice to the defendant beyond that already suffered by him by reason of the delay in bringing the action.

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[8] Needless to say the high degree of culpability called for to warrant a striking out is absent in this case. The plaintiffs' complaint is that although the judge referred to all the relevant principles he failed to have regard to the peculiar facts of the present case when applying them. We think that there is merit in this complaint as we have attempted to demonstrate in this judgment. This is accordingly a case in which the court below failed to take into account relevant considerations when exercising its discretionary power to strike out. Accordingly, this is a case in which appellate intervention is clearly warranted.

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[9] For the reasons already given, the appeal was allowed and the appropriate directions for an early disposal of the action were given. We also ordered that the costs thus far incurred do follow the event of the trial. The deposit was ordered to be refunded to the plaintiffs (appellants).

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